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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 928

RICHARD W. BUER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

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INDEX.

	Page
Petition for Writ of Certiorari	1
Jurisdiction	2
Opinion Below	2
Question Presented for Review	2
Reasons Relied on for Allowance of Writ	2-3
Statement of the Case	3-4
The Statutes Involved	5-7
Argument	8-26
Appendix—Opinion, Circuit Court of Appeals	27-32

AUTHORITIES CITED.

Cases.

Brooks v. U. S., 337 U. S. 49, 51 ..... 9, 13, 14, 16, 19, 24

Brown v. U. S., 99 Fed. Supp. 685 18

Costley v. U. S., 181 Fed. 2d 723, 726 ..... 21, 23

Feres v. U. S., 340 U. S. 135, 138, 139, 146 ..... 9, 12, 19

Herring v. U. S., 98 Fed. Supp. 69, 70 ..... 21, 23

Indian Towing Co. v. U. S., 350 U. S. 61, 68 20

Jefferson v. U. S., 340 U. S. 135 ..... 13, 16

Rosen v. U. S., 126 Fed. Supp. 13, 14 21

Sheehan v. North County Community Hospital, 273 N. Y. 163, 7 N. E. 28 10

Smart v. U. S., 111 Fed. Supp. 907, 908, 207 Fed. 2d 841 .....10, 11, 23
Sontana v. U. S., 175 Fed. 2d 320 .....21, 23
U. S. v. Brown, 348 U. S. 110, 112 .....9, 22, 23, 24
U. S. v. Griggs, 340 U. S. 135 .....13, 19

Statutes.

Title 28, Sec. 1254 (1) 2
Title 28, Sec. 1346 (b), U. S. C. A. 7, 8, 14, 23
Title 28, Sec. 2671-2680, U. S. C. A. 5, 8, 10, 14

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Richard W. Buer respectfully petitions that a Writ of Certicrari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on December 12, 1956 (R. 14).

JURISDICTION.

The opinion and judgment of the Circuit Court of Appeals was filed and entered on December 12, 1956 (R. 14-18). A timely petition for rehearing was denied on March 19, 1957.

The jurisdiction of this court is invoked under 28 U. S. C. A., Section 1254 (1).

QUESTION PRESENTED FOR REVIEW.

1. Does the complaint state a proper cause of action under the Federal Tort Claims Act for claimed negligent medical treatment at an army hospital, for injuries sustained by petitioner, a soldier in the United States Army, which injuries, for which said treatment was given, were sustained while petitioner was on leave and not being incurred in any way with activity incident to military service?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. That the cause of action alleged in the complaint is predicated upon the Federal Tort Claims Act and the statute governing Federal District Courts' jurisdiction and none of the exceptions under the tort act bars petitioner's cause of action; and that the Circuit Court of Appeals has decided federal questions in a way in conflict with applicable decisions of this court and has decided an important question of federal law on the applicability of the tort act to injuries sustained by a soldier on leave and negligent medical treatment for said injuries by an army doctor which has not been, but should be, settled by this court.

2. That the United States is liable for negligence of its personnel causing injuries to a soldier while on leave, and this applying to leave by "furlough" or "sick leave."

3. That under the Tort Claims Act the United States is held liable in the same manner and to the same extent as a private individual under like circumstances.

4. That the Federal Tort Claims Act applies to a soldier who was injured while on leave and was negligently treated by army doctors, the rule applying that if the soldier was negligently treated for such injuries by a private doctor, and the law of the place where the accident occurred allowed such a suit, then the United States is liable for negligent treatment of such injuries by an army doctor.

5. That the trial court and the Appellate Court have denied petitioner a trial by jury on the determination of damages sustained by petitioner where under the applicable statute and authorities, he is entitled to the same.

6. That petitioner, a soldier, while on leave, for injuries sustained in a private automobile on a state highway in North Carolina, was taken to a private hospital and then removed to an army hospital, over which he had no control, and there negligently treated, has been denied his recourse for damages by a decision contrary to the authorities of this and federal courts holding the United States liable under such circumstances.

STATEMENT OF THE CASE.

This action was brought to recover damages under the Federal Tort Claims Act giving the Federal District Court jurisdiction and was occasioned by the alleged negligence of army physicians and surgeons in the treatment of plain-

tiff for injuries sustained while plaintiff was on leave and not in anyway connected with his military status. After arguments on the motions the trial court dismissed the cause of action, thereby predicating its judgment solely on the motion to dismiss (R. 10).

Petitioner filed his complaint alleging that on December 12, 1954, while in the United States Army, and while on leave, he was injured in an automobile accident, and was hospitalized at Fort Bragg, North Carolina, and treated by physicians and surgeons of said army for said injuries and that said injuries were in no way connected with army service; the complaint sets forth the nature of the injuries and the negligence of said physicians and surgeons (R. 2-4).

Defendant filed its motion to dismiss setting forth lack of jurisdiction in that Federal Tort Claims Act does not authorize a suit by a member of the armed forces who receives injuries incident to his service while on active duty; that the complaint failed to state a claim against the defendant; that under special regulations of the army, upon hospitalization, petitioner was not on leave status and that by reason thereof the trial court did not have jurisdiction of the subject matter, nor did the complaint state a cause of action (R. 5-9).

The trial court on argument of the motion entered a judgment dismissing the cause of action (R. 10).

Petitioner took an appeal to the United States Court of Appeals for the Seventh Circuit and said court on December 12, 1956, affirmed the United States District Court. A petition for rehearing was denied on March 19, 1957.

THE STATUTES INVOLVED.

This suit was initiated under the provisions of the Federal Tort Claims Act (U. S. C. A., Title 28, Sec. 2671-2680) and District Courts Jurisdiction (U. S. C. A., Title 28, Sec. 1346 b).

The pertinent sections of the said acts are as follows:

"§ 2674. **Liability of United States**—(U. S. C. A., Title 28).

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983."

"§ 2680. **Exceptions**—(U. S. C. A., Title 28).

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790, of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of section 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Any claim arising from injury to vessels, or to the cargo, crew, or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Railroad Company. June 25, 1948, c. 646, 62 Stat. 984, amended July 16, 1949, c. 340, 63 Stat. 444."

"§ 1346. **United States as defendant (Dist. Court's Juris., U. S. C. A., Title 28).**

. . .

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

ARGUMENT.

A.

Federal Tort Claims Act Alone Contains the Remedy and None of the Exceptions Therein Contained Bar Petitioner's Right to Recover and Under Tort Claims Act United States Shall Be Liable in the Same Manner and to the Same Extent as a Private Individual Under Like Circumstances.

The complaint filed in this cause is predicated under the Federal Tort Claims Act, which act provides that the United States shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, and further provides that Federal District Courts shall have exclusive jurisdiction of said tort claims for loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment under circumstances where the United States, as a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. (Sec. 2671-2680, Federal Tort Claims Act, Sec. 1346 [b] Dist. Court Juris., Title 28, U. S. C. A.)

These statutes have been construed to subject the government to liability for tort claims in the same manner and to the same extent as a private person, and require government employees to follow the pertinent statute and regulations with due care and where the government employees accept a patient into a hospital, they have a duty to refrain from negligence in the manner in which the care, custody and treatment is administered to the patient.

In **U. S. v. Brown,** 348 U. S. 110 (1954), a discharged veteran had been treated while in service for an injury to his knee. After his discharge he was admitted to a veterans hospital and an operation was performed on his knee. The army doctors, during the operation, allegedly used a defective tourniquet, and the nerves in his leg were permanently injured. The respondent sued, and the District Court held that the relief was under the Veterans Act and dismissed the complaint. The Court of Appeals reversed (209 Fed. 2d 463). **Writ of certiorari was granted because of doubts as to whether Brooks v. U. S., 337 U. S. 49, or Feres v. U. S., 340 U. S. 135, controlled the case.**

Court on page 112 held:

> "The Feres decision did not disapprove of the Brooks case. It merely distinguished it, holding that the Tort Claims Act does not cover 'injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.' "

Court on page 112 held:

> "The injury for which suit was brought was not incurred while respondent was on active duty or subject to military discipline. The injury occurred after his discharge, while he enjoyed a civilian status. The damages resulted from a defective tourniquet applied in a veteran's hospital. Respondent was there, of course, because he had been in service and because he had received an injury in the service. And the casual relation of the injury to the service was sufficient to bring the claim under the Veterans Act. **But, unlike the claims in the Feres Case, this one is not foreign to the broad pattern of liability which the United States undertook by the Tort Claims Act.**
>
> "The act provides that, 'The United States shall be liable . . . in the same manner and to the same

extent as a private individual under like circumstances . . .;' (113) certainly this claim is one which might be cognizable under local law if the defendant were a private party. Responsibility of hospitals to patients for negligence may not be as notorious as the liability of the owners of automobiles. But the doctrine is not novel or without support. See, for example, **Sheehan v. North Country Community Hospital,** 273 N. Y. 163, 7 N. E. 28, and the cases collected in 25 A. L. R., 2d 79.

"**We adhere also to the line drawn in the Feres case between injuries that did and injuries that did not arise out of or in the course of military duty. Since the negligent act giving rise to the injury in the present case was not incident to the military service the Brooks case governs and the judgment must be affirmed.**" (Emphasis supplied.)

In **Smart v. U. S.,** 111 Fed. Supp. 907 (1953), 10th Circuit (affirmed 207 Fed. 2d 841), the court on page 908 held:

"The Tort Claims Act subjects the Government to liability for torts in the same manner and to the same extent as a private person. Consequently, no cause of action will lie against the Government unless the employees themselves are personally liable, inasmuch as the Government's liability is founded upon the theory of 'respondeat superior.' Unquestionably, 28 U. S. C. A., Sec. 2680 (a) requires Government employees to follow the pertinent statutes and regulations with due care; and, where Government employees accept a patient into a hospital they have a duty to refrain from negligence in the manner in which the care, custody and treatment is administered to the patient."

In other words, it is the injuries sustained and for which treatment is accorded that gives rise to the cause of action

and, as stated in Smart v. U. S., 111 Fed. Supp. 907, 908, that where government employees accept a patient into a hospital, they have a duty to refrain from negligence in the manner in which the care, custody and treatment is administered to the patient. The case at bar arose out of treatment for injuries sustained while not on active duty. If petitioner had been hospitalized for injuries sustained while on active duty and the malpractice occurred, he would have no recovery. However, the injuries were not incurred while on active duty, and the negligence charged is the manner of treatment for the injuries sustained, which treatment necessarily arose out of injuries sustained while not on active duty.

The pertinent question is, would the petitioner, who sustained injuries while on leave and outside of any military activity, have a cause of action if he were treated by private physicians at a private hospital under like or similar circumstances? There can be no question that the petitioner would have a cause of action for malpractice for negligence under the North Carolina law and under the authorities cited a cause of action under the Act.

The only thing that could conceivably bar petitioner's cause of action would be that the injuries he sustained arose out of or were in the course of activity incident to military service.

The complaint filed in this case alleged that the petitioner was in the United States Army and while on leave and outside of any military duty was injured on a public highway in the State of North Carolina and sustained injuries and was hospitalized at Fort Bragg and treated by physicians and surgeons of the United States Army.

The complaint further charges that the physicians and surgeons, as servants and agents of the United States, neg-

ligently treated petitioner for which he sustained injuries. The complaint, on its face, charges that the injuries did not occur and were in no way connected with the military service of the petitioner (R. 4-6).

The complaint, therefore, on its face, under the statutes above quoted, and the decisions in support thereof, definitely establish a proper claim on behalf of the petitioner for negligent treatment by army doctors at an army hospital for injuries sustained outside of military service.

B.

Federal Tort Claims Act Applies to Soldiers on Leave or Liberty and Recovery Can Be Had Where Injuries Do Not Arise Out of or in the Course of Activity Incident to Military Service.

Defendant in the trial Court and in the appeals Court predicated almost its entire argument on the holding in **Feres v. U. S.**, 340 U. S. 135 (1950), to sustain the contentions set forth in its motion to dismiss or summary judgment (Motion to Dismiss, R. 5-9).

It is, therefore, important at this point of the argument to point out that it stands admitted that the petitioner was injured while on leave and not incident to any activity in military service. It is admitted that these were the injuries for which he was treated by the army doctors.

In the **Feres case**, 340 U. S. 135, a suit was brought on behalf of Bernice B. Feres as Executrix under the Last Will and Testament of Rudolph Feres, deceased, to recover for death caused by negligence under the Federal Tort Claims Act. The decedent perished by fire in the barracks at Pine Camp, New York, while on **active duty** in the service of the United States. The negligence charged was

alleged in quartering him in barracks known to be unsafe. The Federal District Court dismissed the action on the ground decedent was on active duty.

The court also took up the Jefferson case, 340 U. S. 135, which was a suit brought by the plaintiff for alleged negligence in leaving a towel in his stomach after an operation when he was on **active duty** in the military service and which was later found in a subsequent operation after plaintiff was discharged. The Federal District Court dismissed the suit and the Court of Appeals, Fourth Circuit, affirmed the District Court (178 Fed. 2d 518).

The court also took up the Griggs case, 340 U. S. 135, which the District Court dismissed, in which the complaint alleged that while on **active duty** the defendant met death because of negligent and unskillful medical treatment by army surgeons. The District Court dismissed the action, and the Court of Appeals, Tenth Circuit, reversed and held that the complaint stated a cause of action (178 Fed. 2d 1).

The court on page 138 held:

> "The common fact underlying the three cases is that each claimant **while on active duty and not on furlough** sustained injury due to negligence of others in the armed forces. The only issue of law raised is whether the Tort Claims Act extends its remedy to one sustaining 'incident to the service' what under other circumstances would be an actionable wrong. This is the 'wholly different case' reserved from our decision in Brooks v. United States, 337 U. S. 49, 52, 93 L. ed. 1200, 1203, 69 S. Ct. 918, 25 NCCA NS 1."
>
> "We do not overlook considerations persuasive of liability in these cases. The Act does confer district court jurisdiction generally over claims for money damages against the United States founded on negli-

gence. 28 USCA, § 1346 (2) (b), FCA, title 28, § 1346 (2) (b). It does contemplate that the Government will sometimes respond for negligence of military personnel, for it defines 'employee of the Government' to include 'members of the military or naval forces of the United States,' and provides that " 'acting within the scope of his office or employment' in the case of a member of the military or naval forces of the United States, means acting in line of duty." 28 USCA, § 2671, FCA, title 28, § 2671. Its exceptions might also imply inclusion of claims such as we have here. 28 USCA, § 2680 (j), FCA, title 28, § 2680 (j), excepts 'any claim arising out of the **combatant** activities of the military or naval forces, or the Coast Guard, **during time of war'** (emphasis supplied), from which it is said we should infer allowance of claims arising from noncombat activities in peace. Section 2680 (k) excludes 'any claim arising in a foreign country."

The court, on page 139, held:

"Significance also has been attributed in these cases, as in the Brooks case, supra (337 U. S., p. 51, 93 L. ed. 1203, 69 S. Ct. 918, 25 NCCA NS 1), to the fact that eighteen tort claims bills were introduced in Congress between 1925 and 1935 and all but two expressly denied recovery to members of the armed forces; but the bill enacted as the present Tort Claims Act from its introduction made no exception. We also are reminded that the Brooks case, in spite of its reservation of service-connected injuries, interprets the Act to cover claims not incidental to service, and it is argued that much of its reasoning is as apt to impose liability in favor of a man on duty as in favor of one on leave. These considerations, it is said, should persuade us to cast upon Congress, as author of the confusion, the task of qualifying and clarifying its language if the

liability here asserted should prove so depleting of the public treasury as the Government fears."

The court, on page 146, held:

"It is contended that all these considerations were before the Court in the Brooks case and that allowance of recovery to Brooks requires a similar holding of liability here. The actual holding in the Brooks case can support liability here only by ignoring the vital distinction there stated. **The injury to Brooks did not arise out or in the course of military duty.** Brooks was on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission. A Government-owned and operated vehicle collided with him. Brooks' father, riding in the same car, recovered for his injuries and the Government did not further contest the judgment, but contended that there could be no liability to the sons, solely because they were in the Army. This Court rejected the contention, **primarily because Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders.**

"We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for **service-connected injuries** or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command. Accordingly, the judgments in the Feres and Jefferson cases

are affirmed and that in the Griggs case is reversed." (Emphasis supplied.)

The Feres case merely held that a soldier injured while on active duty could not have a claim under the Federal Tort Claims Act. The facts in that case are entirely different than in the case at bar where the injuries sustained by the plaintiff were not sustained on the military reservation or incident to any military service, but while on leave and on a public highway in the State of North Carolina.

Petitioner would like to point out the reasoning in the **Jefferson case**, 178 Fed. 2d 518, 340 U. S. 135. In that case, Jefferson was originally treated for an injury sustained while on active duty. Eight months later he was again operated on, after he was discharged, and at that time an army medical towel was found in his abdomen, **which had been left there from the previous operation.** The negligence charged in that case arose out of the first operation, which was performed while the plaintiff was on active duty, and the court held that a malpractice case could not be brought based on the original operation because the plaintiff was on active duty. It is apparent from the above case that malpractice could only arise out of treatment for the injuries sustained and that if the injuries were sustained while on active duty and the malpractice arose out of the treatment of those injuries, then no recovery can be held under the Federal Tort Claims Act. However, by the same token, if the injuries sustained, for which the medical treatment was accorded, were not incurred while on active duty, then a claim can be presented under the Federal Tort Claims Act and the plaintiff in the case at bar has the right to maintain his action.

In **Brooks v. U. S.**, 337 U. S. 49, the asserted claims against the United States for injuries to one serviceman

and death to another arose while the soldiers were on furlough and not in any way incident to their military service. Walker Brooks, Arthur Brooks, and their father, James Brooks, were riding in their automobile along a public highway in North Carolina on a dark, rainy night in February, 1945. Arthur was driving, and came to a full stop before entering an intersection, and proceeded across the nearer lane to the intersecting road. Seconds later the car was struck from the left by United States Army truck driven by a civilian employee of the army. Arthur Brooks was killed; Walker and his father were badly injured.

Suit was instituted and the District Judge tried the case without a jury and found the negligence on the part of the truck driver. The government moved to dismiss on the ground that Walker and his deceased brother were in the armed forces of the United States at the time of the accident and were, therefore, barred from recovery. The court denied the motion, entered a judgment for $25,425 for decedent's estate and a $40,000 judgment for Walker. The court, on page 51, held:

> "We agree with Judge Parker. **The statute's terms are clear. They provide for district courts jurisdiction over any claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means any claim but that of servicemen.** That statute does contain twelve exceptions, none exclude petitioner's claim, one is for claims arising in a foreign country. The second excludes claims arising out of combatant activities of the military or naval forces or the coast guard during time of war. These and other exceptions are too lengthy, specific and close to present problems to take away petitioner's judgment. Without resorting to automatic maximum of construction, such exceptions make it clear that Congress knew what it was about when it used the term

'any claim.' It would be absurd to believe that Congress did not have the serviceman in mind in 1946, when this statute was passed. The overseas and combatant activities exception make this plain." (Emphasis supplied.)

The court, on page 52, held:

"The government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States. But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend on what has already transpired. Were the accident incident to Brooks' service, a wholly different case would be presented."

The court, on page 53, held:

"Provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors indicate no purpose to forbid tort actions under the Tort Claims Act."

In the case of **Brown v. U. S.**, 99 Fed. Supp. 685 (1951), suits were brought for death of son who enlisted in the United States Navy. On Saturday, June 4, 1949, while in such service he was granted an authorized leave or liberty beginning at 8:30 o'clock a. m. on Saturday, June 4, 1949. On Sunday, June 5, while on such shore leave, he and a companion went to the swimming pool maintained at Key West, Florida, by the United States Naval Station, to go swimming. While in swimming he dived down to the bottom of the pool where his right arm came in contact with an eight-inch suction pipe used to drain water out

of the pool. Suction of the pump drew his right arm into the pipe up to the shoulder and fastened him there so he could not release himself and as a result thereof he was drowned. On page 687 the court held:

> "The defendant contends that the deceased was on active duty and not on furlough at the time of his death and the case is governed by **Feres v. the United States, Jefferson v. the United States, and the United States v. Griggs**, all reported in 340 U. S. 135, 71 Supreme Court 153, 159. With this contention I am unable to agree. At the time of this unfortunate accident the deceased was on leave or liberty and was not on active duty. The facts are similar to **Brooks v. the United States**, 337 U. S. 49, 69 Supreme Court 918, 93 Lawyers Edition 1200, wherein the court held that the government was liable under the Federal Tort Claims Act. In the Feres, Jefferson and Griggs cases, Justice Jackson speaking for the court affirmed the Brooks case in the following language: 'The injury to Brooks did not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway, under the compulsion of no orders or duty and on no military mission. The government owned and operated vehicle collided with him. Brooks' father, riding in the same car, recovered for his injuries and the government did not further contest the judgment but contended that there could be no liability to the sons, solely because they were in the army. This court rejected the contention primarily because Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders.'
>
> "It will thus be seen that so far as the Federal Tort Claims Act is concerned the Supreme Court uses the words 'on furlough' and 'on leave' as synonymous. In

both cases the soldier is not on active duty, is not under compulsion of any orders or duty and is not on any military mission. He is free to go and do as he wishes.

"And again in the same opinion at page 139 of 340 U. S., at Page 156 of 71 Supreme Court, Justice Jackson treats the words 'on furlough' and 'on leave' as synonymous as distinguished from a soldier 'on duty' in the following statement:

" 'We also are reminded that the Brooks' case in spite of its reservation of service—connected injuries, interprets the act to cover claims not incident to service, and it is argued that much of its reasoning is apt to impose liability in favor of man on duty as in favor of one on leave.' "

The Court on Page 690 said:

"For the foregoing reasons defendant's motion to dismiss Action No. 563 is denied and defendant's motion to dismiss and for summary judgment in Action No. 587 are denied."

Indian Towing Co. v. U. S., 350 U. S. 61, was a case where the Coast Guard negligently operated a lighthouse and injuries were sustained to a boat of the plaintiff. In that case the Feres case was cited by the Government to deny liability, and the Court stated that the Government did not need to undertake the service but that when it did, it would be liable for its negligent operation. The court on page 68 held:

"Feres held only that 'the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the **injuries arise out of** or are in the course of activity incident to service.' "

In **Rosen v. U. S.**, 126 Fed. Supp. 13, a soldier was killed in a government plane while on leave. Action was brought under the Federal Tort Claims Act. The court on page 14 held:

> ". . . Whether a member of the armed forces, being 'on pass' or leave, becomes in effect a civilian within the Federal Tort Claims Act . . . and 'in the belief that this controversy cannot be adequately adjudicated upon the existing stipulation, and that the rights of both parties can best be served by the presentation of all available evidence, the motion for summary judgment is denied.' "

In **Herring v. U. S.**, 98 Fed. Supp. 69, the court on page 70 held:

> "However, the court must take issue with the government's argument that the injuries complained of herein arose out of or were incidental to the military service.
>
> "Surely it cannot be stated as a **matter of law** that where a civilian obtains entrance to a government hospital . . ., or because she herself is a veteran, any injury she might suffer as a patient in that hospital arises out of or is incidental to the military service."

In **Sontana v. U. S.**, 170 Fed. 2d 320, the court sustained a claim for injuries due to negligence of army doctors in treating a discharged veteran.

In **Costley v. U. S.**, 181 Fed. 2d 723 (1950), the court on page 726 held:

> "Present case Mrs. Costley had been admitted to the hospital under Army Regulations 40-590, the proper hospital authorities having determined that facilities were available. Therefore, she was authorized and

entitled to receive medical attention under the provisions of Section 2a of Army Regulations No. 40-505, and the government is liable for the negligent acts or conduct of its employees in administering such authorized medical attention."

As stated in **U. S. v. Brown**, 348 U. S. 110, id.,

"The act provides that, 'The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . .; certainly this claim is one which might be cognizable under local law if the defendant were a private party. Responsibility of hospitals to patients for negligence may not be as notorious as the liability of the owners of automobiles. But the doctrine is not novel or without support', citing cases."

It can be concluded from the reading of the above cases that it is now safely established that an action may be maintained for injuries or death not incident to service, but cannot be maintained for service-connected injuries, and that in this case, the petitioner having admittedly sustained injuries while not in service nor on active duty, his cause of action is maintainable under the decisions above cited and even under the decision of the Feres case; and any contention that hospital treatment puts a soldier, or veteran, on active status, or that a claim cannot be made for negligent treatment in a government hospital is dispelled in the case of **U. S. v. Brown**, 348 U. S. 110.

The Circuit Court of Appeals in quoted language from the Feres case on pages 3 and 4 of the opinion as follows:

"We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving. * * *"

Apparently the court took the position that the present cause of action is against petitioner's superior officer. However, when the doctor treated petitioner, he was the same as any other employee, and the government would be liable for his negligence in the same manner as if a private doctor had treated the petitioner. (**U. S. v. Brown**, 348 U. S. 110; **Smart v. U. S.**, 111 Fed. Supp. 907, aff'd 207 F. 2d 841; **Herring v. U. S.**, 98 Fed. Supp. 69; **Costley v. U. S.**, 181 F. 2d 723; **Sontana v. U. S.**, 170 Fed. 2d 320.)

The said court again citing the Feres case on page 4 said:

> "In **Feres**, the court placed considerable emphasis upon the fact that the injuries complained of were incurred in service. The court said, page 143: '* * * It would hardly be a rational plan of providing for those **disabled in service by others in service** to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value.' " (Emphasis supplied.)

The court of appeals has misapprehended this language with reference to a situation which occurred on leave because the Feres case directly ahead of the language cited by the court set forth the following:

> "It is not without significance as to whether the Act should be construed to apply to service-connected injuries that it makes '. . . the law of the place where the act or omission occurred' govern any consequent liability. 28 U. S. C. A., sec. 1346 (2) (b), F. C. A., Title 28, sec. 1346 (2) (b). This provision recognizes and assimilates into federal law the rules of substantive law of the several states, among which divergencies are notorious. **This perhaps is fair enough when the claimant is not on duty or is free to choose his own habitat and thereby limit the jurisdiction in which**

> **it will be possible for federal activities to cause him injury. That his tort claims should be governed by the law of the location where he was elected to be is just as fair when the defendant is the Government as when the defendant is a private individual."** (Emphasis supplied.)

The Feres case definitely recognized that injuries occurring on leave would be under the act.

The Court of Appeals, on page 4 of its Opinion where it states that plaintiff is not here suing the person who caused his injuries on the North Carolina highway, has clearly misapprehended the law. We contend that under the holding in **U. S. v. Brown**, 348 U. S. 110, the government shall be held liable in the same manner and to the same extent as a private individual under like circumstances.

The Court of Appeals' opinion recognizes this situation where, on page 4, it says:

> "Had plaintiff, while on leave, been injured on the North Carolina highway by a government truck and had he sought damages because of those injuries, clearly the case would come within the rule of **Brooks v. United States**, supra."

Wherein did the Court of Appeals draw the distinction from an army doctor negligently treating plaintiff for injuries sustained on leave, from the language just used that plaintiff could recover for negligence of a driver of a government truck? Suppose plaintiff was brought to the army hospital and negligently treated for such injuries, would he be relegated to two causes?

We believe that it is apparent that both the trial court and the Court of Appeals have misapprehended the federal

law applicable to the instant case. The Court of Appeals in holding, "Under army regulations he was no longer on leave" erroneously construed this as meaning active duty, when the regulation itself showed petitioner was on sick leave and not active duty the said regulation being:

> "Special Regulations No. 600-115-1 of the Department of the Army promulgated September 24, 1953, entitled 'Personnel' and subparagraph entitled 'Leave' provides in paragraph 13 (b) as follows:
>
> > 'The status of personnel who are hospitalized while on leave will change from "leave" to "sick in hospital" as of date of admission to hospital. No charge against leave credits will be made for the period of hospitalization. The command which granted leave will be notified promptly of the admission to hospital. Unless otherwise directed by the command which granted the original leave, personnel will revert to leave status for the unexpired portion of leave upon completion of hospitalization. In such cases a new DA Form 31 will be issued by the hospital, and the duplicate copy forwarded to the command authorizing the original leave. If personnel are admitted to other than an Army hospital, the Army hospital administratively responsible for the patient will take action as indicated above' " (R. 5-6).

This regulation showing that petitioner was never returned to "active duty," but at most was on "sick leave" by reason of his non-active duty injuries, and was negligently treated while on leave whether you call it furlough or sick in hospital.

Wherefore, petitioner prays that a Writ of Certiorari be issued out of this Honorable Court to review the judgment

of the Circuit Court of Appeals in this cause, and for such other relief as to this court may seem proper.

Dated April 9th, 1957.

RICHARD W. BUER,
Petitioner,

By FRED P. SCHUMAN,
1308a Niedringhaus Avenue,
Granite City, Illinois,
Attorney for Petitioner.

APPENDIX.

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

11797 September Term and Session, 1956.

Richard W. Buer,
Plaintiff-Appellant,
vs.
United States of America,
Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

December 12, 1956.

Before Duffy, Chief Judge, and Finnegan and Schnackenberg, Circuit Judges.

Duffy, Chief Judge. This action was brought under the Federal Tort Claims Act, Title 28, U. S. C. A., § 2671, et seq. Plaintiff alleges that on December 12, 1954, while he was in the armed forces of the United States, stationed at Fort Bragg, North Carolina, and while on leave, he was injured in an automobile accident; that by reason of injuries there received he was hospitalized at Fort Bragg, and at that place was treated by physicians and surgeons of the United States Army; that said physicians and surgeons were negligent and did not use proper care and skill in treating plaintiff, and in performing an operation on

him, in that a piece of drill was left in his body near the lateral orbital wall of plaintiff's left eye causing him severe injuries. Judgment in the sum of Fifty Thousand ($50,000.00) Dollars was demanded.

The Government moved to dismiss on various grounds, three of the reasons being 1) the Court lacks jurisdiction of the subject matter as the Federal Tort Claims Act does not authorize a suit against the United States of America by a member of the armed forces who receive injuries incident to his service while on active duty; 2) the complaint fails to state a claim upon which relief can be granted, and 3) the Court lacks jurisdiction of the subject matter because the allegations of the complaint charge an assault upon the plaintiff by an agent or employee of the United States of America, and such claims are exempted from permissible actions under the Federal Tort Claims Act [§ 2680 (h)]. The motion set forth the pertinent part of Army Special Regulations, No. 600-115-1. A. R. 600-115-1, September 24, 1953, Personnel. 13 (b) Leave: "The status of personnel who are hospitalized while on leave will change from 'leave' to 'sick in hospital' as of date of admission to hospital. * * *." The District Court entered an order dismissing the complaint.

In arguing that the Federal Tort Claims Act covers the claim asserted in the case at bar, plaintiff points out that the Act states as the test of allowable claims: "The United States shall be liable, * * * in the same manner and to the same extent as a private individual under like circumstances * * *" (28 U. S. C. A., § 2674). Plaintiff emphasizes the Tort Claims Act provides broadly that the District Court shall have jurisdiction over claims for money damages against the United States founded on negligence.

Plaintiff relies primarily upon Brooks v. United States (1949), 337 U. S. 49, and United States v. Brown (1954),

348 U. S. 110. In Brooks, two brothers, Walker and Arthur Brooks, were enlisted men in the United States Army. They were on leave or furlough and were riding with their father in a private automobile on a public highway in North Carolina. The Brooks' automobile came into collision with an army truck operated by a civilian employee of the War Department. The court held the action could be maintained under the Federal Tort Claims Act.

In United States v. Brown, supra, plaintiff, while in active service, injured his knee. The injury led to his honorable discharge in 1944. In 1950 and 1951, while being treated at a Veterans' Administration hospital, surgeons operated on the knee. During the 1951 operation a defective tourniquet was used as a result of which the nerves in respondent's leg were seriously and permanently injured. The majority of the court held that the negligent act giving rise to the injury was not incident to the military service and, therefore, the action could be maintained under the Federal Tort Claims Act.

The Government relies largely on Feres v. United States (1950), 340 U. S. 135. Along with Feres there was decided sub. nom. Jefferson v. United States, 4 Cir., 178 F. 2d 518, and Griggs v. United States, 10 Cir., 178 F. 2d 1.

In Feres the action was commenced by the Executrix of Feres because decedent perished in a fire in the barracks of an army camp while on active duty. Negligence was alleged in quartering him in barracks known or which should have been known to be unsafe because of a defective heating plant, and in failing to maintain an adequate fire watch.

In Jefferson, plaintiff, while on active duty, was required to undergo an abdominal operation. Eight months

later, in the course of another operation, at a time after plaintiff had been discharged, a towel 30 inches long and 18 inches wide, marked "Medical Department U. S. Army" was removed from his stomach. The complaint alleged that the towel had been negligently left there by the army surgeons who performed the first operation.

In Griggs the deceased was a lieutenant colonel on active duty and was admitted to an army hospital for the purpose of treatment and surgery. Death occurred while the officer was under treatment and his widow brought suit for damages alleging wrongful death caused by the negligent and unskillful act of members of the army medical corps.

The court held in Feres, Jefferson and Griggs that the respective suits based upon the Federal Tort Claims Act would not lie. Therefore, we must ascertain whether the case at bar falls within the principles laid down in the Brooks and Brown cases or whether the rule of law established in Feres, Jefferson and Griggs should be applied.

In Feres, the Court said, page 141: "* * * One obvious shortcoming in these claims is that plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving. * * *."

In Feres, the court placed considerable emphasis upon the fact that the injuries complained of were incurred in service. The court said, page 143: "* * * It would hardly be a rational plan of providing for those **disabled in service by others in service** to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value." (Emphasis supplied.)

The court also said, page 144: "* * * The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for **injuries incident to military service.**" (Emphasis supplied.)

The court also said, page 146: "We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the **injuries arise out of or are in the course of activity incident to service.**" (Emphasis supplied.)

Plaintiff insists that the injuries complained of in the case at bar did not arise out of his military service because when he was injured on the highway he was on leave. However, plaintiff is not here suing the person who caused his injuries on the North Carolina highway. His claim is based upon alleged malpractice of the army surgeon who operated upon him after he had been returned to the hospital at the Post where he was assigned for military duty.

Had plaintiff, while on leave, been injured on the North Carolina highway by a government truck, and had he sought damages because of those injuries, clearly the case would come within the rule of Brooks v. United States, supra. It is interesting to note the prophetic quote in the Brooks' opinion, page 52: "The Government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States. But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented."

Here we have the "army surgeon's slip of hand". Plaintiff was in the army hospital at Fort Bragg because he was a member of the armed forces of the United States located at that station. Under army regulations he was no longer on leave. We hold the rule announced in Feres Jefferson and Griggs is applicable, and the judgment dismissing the complaint is

Affirmed.

Schnackenberg, Circuit Judge.

In concurring with the result reached by Judge Duffy I express the opinion that the army regulation pertaining to leave is not essential to the result reached.

A true copy:

Teste:

Kenneth J. Carrick,
Clerk of the United States Court of
Appeals for the Seventh Circuit.

33/42

No. 928

FILED
APR 22 1957
JOHN T. FEY, Clerk

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

SEPTEMBER TERM, 1956.

No. 11,797.

RICHARD W. BUER,
Plaintiff-Appellant,
vs.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

Before the Honorable Charles G. Briggle,
United States District Judge.

APPENDIX

To Brief of Plaintiff-Appellant Containing Transcript of the Record.

FRED P. SCHUMAN,
1308a Niedringhaus Avenue,
Granite City, Illinois,
Attorney for Plaintiff-
Appellant.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-6477.

INDEX TO APPENDIX.

	Page
Preliminary Statement to Appendix	1
Appendix "A"—Complaint	2
Appendix "B"—Motion to Dismiss or Motion for Summary Judgment and Answer	5
Appendix "C"—Judgment and Order of the Trial Court	10
Appendix "D"—Notice of Appeal	11

PRELIMINARY STATEMENT TO APPENDIX.

This suit was commenced on November 14, 1955, by the plaintiff, Richard W. Buer, against the defendant, the United States of America, by the filing of a complaint in the District Court of the United States for the Southern District of Illinois, Southern Division.

A Motion to Dismiss or Motion for Summary Judgment and Answer was filed by defendant on February 7, 1956.

The District Court allowed the Motion to Dismiss the complaint on March 9, 1956, after a hearing on March 5, 1956.

On April 2, 1956, the plaintiff elected to stand by his complaint, and the court entered judgment in favor of the defendant, dismissing the complaint with costs against the plaintiff, which judgment was as follows:

> "Come now the parties to the above entitled cause by their respective attorneys and the plaintiff elects to stand by his complaint, whereupon, it is ordered by the court that judgment be and is hereby entered in favor of the defendant, the United States of America, and against the plaintiff, Richard W. Buer, dismissing the complaint herein with costs against said plaintiff."

The above orders were entered by Judge Charles G. Briggle, and no other proceedings were had in this cause.

Notice of Appeal was filed on April 26, 1956, and the court by appropriate order extended the time to file a transcript of the record in this court, and that the transcript of the record was filed within the time allowed by the trial court.

Record Page

APPENDIX "A".

Complaint (omitting caption, filed Nov. 14, 1955).

4-6 "Now comes Richard W. Buer, plaintiff, by Fred P. Schr[illegible]an, his attorney, and for cause of action against the defendant says:

1. That he is a resident of Granite City Township, County of Madison, and State of Illinois.

2. That this suit is brought under the Federal Tort Claims Act.

3. That on December 12, 1954, while said plaintiff was in the service of the United States and in the army thereof, being stationed at Fort Bragg, North Carolina, and while on leave, was injured in an automobile accident and by reason thereof was hospitalized at said Fort Bragg and treated by physicians and surgeons of the U. S. Army, but that said injuries sustained were in no way connected with the service of said plaintiff.

4. That at said time the defendant, through its physicians and surgeons, and as such, its agents and servants at said United States Army Hospital undertook to treat said plaintiff for the following injuries: Fracture, maxilla, bi-laterally, involving the lateral portion of the floor of both antra. Also involving the floor of the left orbit, and the left zygomatic arch and nasal bone, and did perform the following operations on said plaintiff: 17 Dec. 54 Fracture, maxilla, reduction of labial arch, bars placed on maxillary and mandibular teeth. A plaster head cap was applied and Cranio-Maxillary fixation employed via stainless steel wires passed through both cheeks and attached to labial arch bar and head cap. The teeth were brought

into normal occlusion and held by means of intermaxillary elastic traction, anesthesia local.

5. That the defendant, through its physicians and surgeons and as such, its servants and agents, was negligent and did not use due or reasonable or proper care or skill in treating and performing the operations on plaintiff as hereinabove stated in the following particulars:

(a) That in the treatment and performance of the operations hereinabove described the defendant carelessly and negligently left a foreign body, which is described as a piece of a drill, near the lateral orbital wall of the left eye.

(b) That the defendant negligently and carelessly failed to provide adequate treatment to said plaintiff.

(c) That the defendant, through its physicians and surgeons, performed said above described operations in a negligent and careless manner.

6. That plaintiff at all times hereinabove mentioned was in the exercise of due care.

7. That by means and in consequence of said negligence as aforesaid and as a direct and proximate result of said negligence, plaintiff was thereby greatly injured and that he has sustained a serious and permanent disability to his left eye, head and face by reason of the leaving of said foreign body near the lateral orbital wall of the left eye and that by reason of said negligent treatment and operations there is a lag of the left eye in horizontal gaze and in up-left gaze a lag of the left eye again, which has resulted in residual partial paralysis of the lateral rectus muscle and the superior rectus muscle of the left eye, and that by reason thereof the left eye is sunken in three milli-

meters as compared with the right eye, and that said plaintiff has sustained serious and permanent disfigurement to his face as a result of the careless and negligent manner in which he was treated and that by reason thereof he has sustained serious and permanent injuries to his left eye and as a result thereof to his entire body, all to the plaintiff's damage in the sum of Fifty Thousand ($50,000.00) Dollars.

Wherefore, plaintiff, Richard W. Buer, prays judgment against the defendant in the sum of Fifty Thousand ($50,000.00) Dollars and costs of suit.

s/ Richard W. Buer,
Plaintiff.

By s/ Fred P. Schuman,
1308a Niedringhaus Avenue,
Granite City, Illinois,
His Attorney."

APPENDIX "B".

Motion to Dismiss or Motion for Summary Judgment and Answer (Filed February 7, 1956).

11-14 "The United States of America, defendant, by the United States Attorney for the Southern District of Illinois, pursuant to Rule 12 and Rule 56 of the Rules of Procedure, moves in the alternative for a dismissal of this action, or for summary judgment in its behalf, and for reasons states as follows:

1. The Court lacks jurisdiction of the subject matter in this proceeding, as the Federal Tort Claims Act (Section 2671 et seq. of Title 28, United States Code) does not authorize or permit a suit against the United States of America by a member of the armed forces who receives injuries incident to his service while on active duty (**Feres v. United States**, 340 U. S. 135 [1950]).

2. The complaint fails to state a claim against the United States of America upon which relief can be granted, for the same reason as set out in paragraph one above.

3. In accordance with Rule 43 of the Rules of Procedure, the Court can take judicial notice of Special Regulations of the Department of the Army. Special Regulations No. 600-115-1 of the Department of the Army promulgated September 24, 1953, entitled "Personnel" and sub-paragraph entitled "Leave" provides in paragraph 13 (b) as follows:

> "The status of personnel who are hospitalized while on leave will change from 'leave' to 'sick in hospital' as of date of admission to hospital. No charge against leave credits will be made for the period of hospitalization. The command which granted leave will be notified promptly of

> the admission to hospital. Unless otherwise directed by the command which granted the original leave, personnel will revert to leave status for the unexpired portion of leave upon completion of hospitalization. In such cases a new DA Form 31 will be issued by the hospital, and the duplicate copy forwarded to the command authorizing the original leave. If personnel are admitted to other than an Army hospital, the Army hospital administratively responsible for the patient will take action as indicated above."

The plaintiff, consequently, was not on leave status at the time of the alleged negligent act.

4. Assuming the allegations of the complaint to be true, by reason of the aforementioned Army Regulation, which was in existence on the date that the plaintiff was hospitalized, this Court does not have jurisdiction of the subject matter as set out in paragraph one above, nor does the complaint state a cause of action as alleged in paragraph two above, by applying the doctrine of the recent Supreme Court decision, **Feres v. United States**, 340 U. S. 135 (1950).

5. The Court lacks jurisdiction of the subject matter for the reason that the allegations of the complaint charge an assault on the plaintiff by an agent or employee of the United States of America. Such claims are specifically excepted from permissible actions under the Federal Tort Claims Act (Section 2671, supra) by Section 2680 (h), which provides:

> "The provisions of this Chapter and Section 1346 (b) of this Title shall not apply to any claim arising out of assault, battery, false imprisonment * * *."

ANSWER.

The United States of America, defendant in the above action, by the United States Attorney for the Southern District of Illinois, answers the complaint as follows:

1. The allegations contained in paragraph one of the complaint are admitted.

2. The allegations contained in paragraph two of the complaint are admitted.

3. The allegations contained in paragraph three of the complaint are admitted. However, an ambiguity exists in the statement, "but that said injuries sustained were in no way connected with the service of said plaintiff." If the statement refers to the injuries sustained in the automobile accident, then such allegation is admitted; but if the allegation refers to any injuries that the plaintiff might have suffered while receiving medical treatment, then it is expressly denied.

4. The allegations contained in paragraph four of the complaint are admitted.

5. The allegations contained in paragraph five of the complaint are admitted.

6. The allegations contained in paragraph six of the complaint are admitted.

7. The allegations contained in paragraph seven of the complaint are denied.

Affirmative Defense No. One.

Plaintiff at the time he received the injuries complained of in this action was a member of the Armed Forces on active status and consequently received such alleged injuries incident to his service, which is a bar to relief under the Federal Tort Claims Act.

Affirmative Defense No. Two.

Plaintiff, at the time he received the alleged injuries complained of in this action, was a member of the Armed forces on active duty is restricted to those Statutory rights or benefits established by Congress for persons in the military service, which statutory benefits the plaintiff has since the date of the complained injuries made application for to the Veterans Administration.

John B. Stoddart, Jr.,
United States Attorney.

Affidavit.

State of Illinois, }
Sangamon County. } ss.

John B. Stoddart, Jr., United States Attorney for the Southern District of Illinois, states on oath that he has read the foregoing motion to dismiss or motion for summary judgment and answer to the complaint, and that the Allegations contained therein are true to the best of his information, knowledge and belief, and he further states that the Army Regulation, S. R. 600-115-1, will be tendered to the Court upon request or to counsel for the plaintiff.

John B. Stoddart, Jr.,
United States Attorney.

Subscribed and sworn to before me this 7th day of February, 1956.

s/ G. W. Schwaner,
Clerk, U. S. District Court for the
Southern District of Illinois.

I certify that a copy of the above motion to dismiss or motion for summary judgment and answer to the complaint was mailed to Fred P. Schuman, Attorney at Law, 1308a Niedringhaus Avenue, Granite City, Illinois, this 7th day of February, 1956.

John B. Stoddart, Jr.,
United States Attorney.

APPENDIX "C".

Judgment and Order of the Trial Court.

16 "Come now the parties to the above entitled cause by their respective attorneys and the plaintiff elects to stand by his complaint, whereupon, it is ordered by the court that judgment be and is hereby entered in favor of the defendant, the United States of America, and against the plaintiff, Richard W. Buer, dismissing the complaint herein with costs against said plaintiff."

APPENDIX "D".

Notice of Appeal

(Filed April 26, 1956).

18 "Notice is hereby given that Richard W. Buer, plaintiff, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order and final judgment, which is as follows:

> 'Plaintiff elects to stand by his complaint. Judgment in favor of Defendant dismissing Complaint with costs against Plaintiff',

which order and judgment was entered on April 2, 1956.

Signed this 25th day of April, A. D., 1956.

s/ Fred P. Schuman,
1308a Niedringhaus Avenue,
Granite City, Illinois,
Attorney for Appellant,
Richard W. Buer."

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	4
Conclusion	10

CITATIONS

Cases:

Archer v. *United States*, 217 F. 2d 548, certiorari denied, 348 U.S. 953	9
Brooks v. *United States*, 337 U.S. 49	4, 5, 6, 7, 8
Feres v. *United States*, 340 U.S. 135	4, 5, 6, 7, 8, 9
Indian Towing Co. v. *United States*, 350 U.S. 61	6
Norris v. *United States*, 229 F. 2d 439	6
Orken v. *United States*, 239 F. 2d 850	9
Ostrander v. *United States*, 178 F. 2d 923, certiorari denied, 340 U.S. 903	6
Preferred Insurance Company v. *United States*, 222 F. 2d 942, certiorari denied, 350 U.S. 837, rehearing denied, 351 U.S. 990	9
United States v. *Brown*, 348 U.S. 110	4, 5, 6, 8, 9
United States v. *United Services Automobile Ass'n.*, 238 F. 2d 364	9
Zoula v. *United States*, 217 F. 2d 81	9

Statute:

Federal Tort Claims Act (62 Stat. 869)	2, 3, 4, 5, 6
28 U.S.C. 1346(b)	2
28 U.S.C. 2674	2

Miscellaneous:

Army Special Regulations No. 600-115-1	3, 8

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 928

RICHARD W. BUER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment of the District Court for the Southern District of Illinois, dismissing petitioner's complaint (R. 10), was entered without an opinion. The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. 27-32) is reported at 241 F. 2d 3.

JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1956 (Pet. 4). A petition for re-

hearing was denied on March 19, 1957 (Pet. 4). The petition for a writ of certiorari was filed on April 22, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether damages may be recovered under the Federal Tort Claims Act for injuries sustained by a soldier incident to his service as a result of the alleged negligence of other military personnel while the soldier was hospitalized in a military hospital for injuries incurred while he was on leave.

STATUTE INVOLVED

Sections 1346(b) and 2674 of Title 28 U.S.C. (part of the Federal Tort Claims Act) provide:

> 1346(b). Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> 2674. The United States shall be liable, respecting the provisions of this title relating to

tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * *

STATEMENT

Petitioner, a soldier "stationed at Fort Bragg, North Carolina," filed this complaint for damages under the Federal Tort Claims Act for injuries sustained while "hospitalized at said Fort Bragg and treated by physicians and surgeons of the U. S. Army" (R. 2). At the time of the alleged malpractice, the complaint emphasized, petitioner "was in the service of the United States and in the army thereof" and was being treated for injuries he had received in an automobile accident while on leave from his post (R. 2).

The United States answered and also moved to dismiss on the ground that the soldier's hospitalization injuries while at Fort Bragg were incident to his military service and therefore not actionable under the Federal Tort Claims Act (R. 5, 7). The Government's motion pointed out that, while the soldier was on leave at the time of his automobile accident, he "was not on leave status" after his admission to the Fort Bragg hospital, where the alleged malpractice which forms the basis for the present action took place (R. 6).[1]

---

[1] The pertinent Army Special Regulations No. 600-115-1 (R. 5) provide:

A. R. 600-115-1 (September 24, 1953). Personnel.

The District Court granted the motion and dismissed the complaint (R. 1, 10). The Court of Appeals for the Seventh Circuit, in an opinion by Chief Judge Duffy, affirmed (Pet. 32).

ARGUMENT

Petitioner contends in effect that he may recover damages from the United States under the Tort Claims Act for a service-incident injury incurred by him while undergoing treatment and surgery at an Army hospital. But this Court has already considered and rejected that precise contention in Army malpractice actions on all fours with the present case. *Feres* v. *United States*, 340 U.S. 135; *United States* v. *Brown*, 348 U.S. 110; and *Brooks* v. *United States*, 337 U.S. 49. The record in this case plainly establishes that the soldier's injury was incident to his service since the alleged negligence occurred when he was no longer on leave and while he was being operated on by an Army doctor in an Army hospital.

13(b). Leave.

The status of personnel who are hospitalized while on leave will change from "leave" to "sick in hospital" as of date of admission to hospital. No charge against leave credits will be made for the period of hospitalization. The command which granted leave will be notified promptly of the admission to hospital. Unless otherwise directed by the command which granted the original leave, personnel will revert to leave status for the unexpired portion of leave upon completion of hospitalization. In such cases a new DA Form 31 will be issued by the hospital, and the duplicate copy forwarded to the command authorizing the original leave. If personnel are admitted to other than an Army hospital, the Army hospital administratively responsible for the patient will take action as indicated above.

Both courts below therefore correctly applied the decisions of this Court in denying recovery. There is, we submit, no warrant for further review or reconsideration at this time.

1. It was implied in *Brooks* v. *United States*, 337 U.S. 49, 50, 52, that service-incident injuries resulting, for example, from "an army surgeon's slip of hand", are not actionable under the Federal Tort Claims Act. The next case of *Feres* v. *United States*, 340 U.S. 135, left nothing to implication. In *Feres*, where plaintiff sought damages for the wrongful death of her husband, an Army lieutenant, who had died in a barracks fire at an Army post, the Court held that such a service-incident claim is not within the coverage of the Act. However, it is of particular importance here that along with *Feres* the Court considered and decided the *Jefferson* case from the Fourth Circuit and the *Griggs* case from the Tenth Circuit, both based—as is this case—on allegedly negligent medical treatment of military personnel in Army hospitals. 340 U.S. 135, 137. In these two additional cases, the Court ruled flatly that the death or injury of a serviceman due to negligent and unskilled medical treatment in the course of his military service does not furnish a basis for a claim for damages under the Tort Claims Act. 340 U.S. 135. And in *United States* v. *Brown*, 348 U.S. 110, 112, 113, the Court, as if to dispel all possible doubts as to the continuing need for excluding from the Act's coverage service-incident claims arising out of malpractice at Army hospitals, expressly noted its adherence "to the line drawn" in the *Feres-Jefferson-Griggs*

cases as to injuries which "arise out of or are in the course of activity incident to service." [2]

It is true that in both *Brooks* and *Brown*, unlike *Feres-Jefferson-Griggs*, it was concluded that causes of action had been stated under the Tort Claims Act. But *Brooks* and *Brown*, as those two opinions carefully demonstrate, involved injuries *not* incident to the claimants' military service. 337 U.S. 49, 52; 348 U.S. 110, 112. In the present case, the facts leave no room for doubt that the malpractice claim, like the malpractice claims in *Feres-Jefferson-Griggs*, is service-incident in nature and hence barred under the Act. This is clearly borne out by a comparison of the facts in the *Brown* and *Brooks* cases, on one hand, with those in *Feres-Jefferson-Griggs* and the instant case, on the other.

In *Brown*, a veteran sued the United States for the alleged negligence of another civilian at a Veterans' Administration hospital. Brown's injury occurred, the Court noted, not while he was "subject to military discipline" but "after his discharge, while he enjoyed a civilian status." 348 U.S. 110, 112.

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[2] Even more recently, in *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69, the Court quoted with approval its *Feres-Jefferson-Griggs* holding to the effect that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. * * * " In addition, lower courts have consistently rejected soldiers' malpractice claims as not falling within the purview of the Tort Claims Act. *Ostrander* v. *United States*, 178 F. 2d 923 (C.A. 2), certiorari denied, 340 U.S. 903; *Norris* v. *United States*, 229 F. 2d 439 (C.A. 2).

Similarly in *Brooks*, the plaintiff soldiers were riding in their privately owned automobile on a public highway when they were struck by a government vehicle driven by a civilian employee. They were not then on any business even remotely connected with their military service nor were they on the highway, where they were hit, because of their being soldiers. 337 U.S. 49, 52.

The claims in *Feres-Jefferson-Griggs* and in the instant case, on the other hand, show that they arose not only incident to military service but as a direct result thereof. Feres, after completing his military duty for the day, burned to death while sleeping in his barracks. Negligence was asserted on the part of other military personnel in maintaining a defective heating plant in the barracks. The *Griggs* and *Jefferson* cases, as already noted, arose—exactly as did the case now here—as malpractice actions by the plaintiff soldiers for alleged negligence on the part of Army surgeons at Army hospitals. In all three cases, it is obvious that the injuries and death were incident to and had occurred because of the servicemen's military service—Feres would not have been in the barracks had he not been in the service; Griggs and Jefferson would not have been operated on by Army doctors in Army hospitals had they not been in the military service.

Similarly, in the present case it was only because petitioner was a soldier on active duty at Fort Bragg that he was operated on in the Fort Bragg Army hospital where the alleged negligence occurred. Thus, the claim here is precisely the same as those which

were before the Court in the *Jefferson* and *Griggs* malpractice cases. Both courts below therefore were plainly correct in holding that "the rule [of Governmental non-liability] announced in Feres, Jefferson and Griggs is applicable" here (Pet. 32).

2. Petitioner, in attempting to escape the impact of the *Feres-Jefferson-Griggs* holdings, suggests that his injuries were "not sustained * * * incident to any military service, but while on leave and on a public highway in the State of North Carolina" (Pet. 16). But those injuries—that is, those received in the automobile accident on the public highway—are not involved here. As stated by the court below, petitioner "is not here suing the person who caused his injuries on the North Carolina highway. His claim is based upon alleged malpractice of the army surgeon who operated upon him after he had been returned to the hospital at the Post where he was assigned for military duty" (Pet. 31).

Nor can there be any doubt that petitioner was not on leave status at the time of his hospitalization injuries. Army Special Regulations 600-115-1 make it plain that he then "was no longer on leave", his leave having expired on admission to the Post hospital (R. 5-6; Pet. 32). He was then in exactly the same status and situation as were Griggs and Jefferson when they were operated on in the Army hospitals at the particular military posts to which they had been assigned. Moreover, this Court's holdings in *Brooks*, *Brown*, and *Feres-Jefferson-Griggs*, to the effect that Army malpractice and other service-incident claims are excluded from the Act, do not turn

on the formal leave or nonleave status of the serviceman.[3] On the contrary, the holdings rest on considerations of the "special relationship of the soldier to his superiors" and to the Government, of "the effects of the maintenance of such suits on [military] discipline" and of the "sharp * * * break in tradition" if a soldier were allowed to recover for the negligence of another soldier. *United States* v. *Brown*, 348 U.S. 110, 112; *Feres* v. *United States*, 340 U.S. 135, 141. Reliance on these identical considerations, as fully applicable to the present service-incident malpractice claim as they were to the similar claims in *Feres-Jefferson-Griggs*, makes it doubly clear that both courts below correctly excluded this claim from the Act.

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[3] Judge Schnackenberg's concurring opinion below, stating "that the army regulation pertaining to leave is not essential to the result reached" (Pet. 32), is based on this reasoning. And, in further line with this reasoning, several courts of appeals, recognizing that whether or not a serviceman is on leave is immaterial, have refused to allow recovery for a soldier's service-incident injuries even though they were incurred on leave. *Preferred Insurance Company* v. *United States*, 222 F. 2d 942 (C.A. 9), certiorari denied, 350 U.S. 837, rehearing denied, 351 U.S. 990; *Zoula* v. *United States*, 217 F. 2d 81 (C.A. 5); *Archer* v. *United States*, 217 F. 2d 548 (C.A. 9), certiorari denied, 348 U.S. 953; see also *United States* v. *United Services Automobile Ass'n.*, 238 F. 2d 364 (C.A. 8); *Orken* v. *United States*, 239 F. 2d 850 (C.A. 6).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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